

**First Regular Session
Seventy-fourth General Assembly
STATE OF COLORADO**

INTRODUCED

LLS NO. 23-0705.01 Christy Chase x2008

SENATE BILL 23-172

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A BILL FOR AN ACT

101 **CONCERNING PROTECTIONS FOR COLORADO WORKERS AGAINST**
102 **DISCRIMINATORY EMPLOYMENT PRACTICES.**

Bill Summary

(Note: This summary applies to this bill as introduced and does not reflect any amendments that may be subsequently adopted. If this bill passes third reading in the house of introduction, a bill summary that applies to the reengrossed version of this bill will be available at <http://leg.colorado.gov>.)

For purposes of addressing discriminatory or unfair employment practices pursuant to Colorado's anti-discrimination laws, the bill enacts the "Protecting Opportunities and Workers' Rights (POWR) Act", which:

- Directs the Colorado civil rights division (division) to include "harassment" as a basis or description of discrimination on any charge form or charge intake

Shading denotes HOUSE amendment. Double underlining denotes SENATE amendment.
Capital letters or bold & italic numbers indicate new material to be added to existing law.
Dashes through the words or numbers indicate deletions from existing law.

- mechanism;
- Adds a new definition of "harass" or "harassment" and repeals the current definition of "harass" that requires creation of a hostile work environment;
- Adds protections from discriminatory or unfair employment practices for individuals based on their "marital status";
- Specifies that in harassment claims, the alleged conduct need not be severe or pervasive to constitute a discriminatory or unfair employment practice;
- For purposes of the exception to otherwise discriminatory practices for an employer that is unable to accommodate an individual with a disability who is otherwise qualified for the job, eliminates the ability for the employer to assert that the individual's disability has a significant impact on the job as a rationale for the employment practice;
- Specifies that it is a discriminatory or an unfair employment practice for an employer to fail to initiate an investigation of a complaint or to fail to take prompt, reasonable, and remedial action;
- Specifies the requirements for an employer to assert an affirmative defense to an employee's proven claim of unlawful harassment by a supervisor; and
- Specifies the requirements that must be satisfied for a nondisclosure provision in an agreement between an employer and an employee or a prospective employee to be enforceable.

1 *Be it enacted by the General Assembly of the State of Colorado:*

2 **SECTION 1. Short title.** The short title of this act is the
 3 "Protecting Opportunities and Workers' Rights (POWR) Act".

4 **SECTION 2.** In Colorado Revised Statutes, 24-34-306, **amend**
 5 (1)(a) as follows:

6 **24-34-306. Charge - complaint - hearing - procedure -**
 7 **exhaustion of administrative remedies.** (1) (a) (I) Any person claiming
 8 to be aggrieved by a discriminatory or AN unfair practice as defined by
 9 parts 4 to 7 of this ~~article~~ ARTICLE 34 may, by ~~himself or herself~~ ONESELF
 10 or through ~~his or her attorney-at-law~~ THE PERSON'S ATTORNEY, make,

1 sign, and file with the division a verified written charge stating the name
2 and address of the respondent alleged to have committed the
3 discriminatory or unfair practice, setting forth the particulars of the
4 alleged discriminatory or unfair practice, and containing any other
5 information required by the division.

6 (II) THE DIVISION SHALL INCLUDE ON ANY CHARGE FORM OR
7 CHARGE INTAKE MECHANISM AN OPTION TO SELECT "HARASSMENT" AS A
8 BASIS OR DESCRIPTION OF THE TYPE OF DISCRIMINATORY OR UNFAIR
9 EMPLOYMENT PRACTICE THAT IS THE SUBJECT OF THE CHARGE.

10 **SECTION 3.** In Colorado Revised Statutes, **add** 24-34-400.2 as
11 follows:

12 **24-34-400.2. Legislative declaration.** (1) THE GENERAL
13 ASSEMBLY FINDS THAT:

14 (a) ALL COLORADANS SHOULD HAVE AN EQUAL OPPORTUNITY TO
15 SUCCEED IN THE WORKPLACE AND ARE ENTITLED TO A WORKPLACE THAT
16 IS SAFE AND FREE FROM DISCRIMINATION AND HARASSMENT BASED ON
17 THEIR PROTECTED STATUS;

18 (b) WHEN EMPLOYEES HAVE A SAFE WORKPLACE THAT IS FREE
19 FROM DISCRIMINATION AND HARASSMENT, THOSE EMPLOYEES ARE MORE
20 PRODUCTIVE AND ARE MORE INCLINED TO REMAIN IN THEIR JOBS, AND
21 THEIR EMPLOYERS BENEFIT FROM INCREASED EMPLOYEE PRODUCTIVITY
22 AND RETENTION;

23 (c) WHILE MANY EMPLOYERS HAVE MADE GREAT STRIDES IN
24 IMPROVING WORKPLACE ENVIRONMENTS BY MAKING THEM FREE FROM
25 DISCRIMINATION AND HARASSMENT SINCE THIS PART 4 WAS FIRST
26 ENACTED IN 1951, MANY EMPLOYEES IN THIS STATE STILL EXPERIENCE
27 DISCRIMINATION AND HARASSMENT IN THE WORKPLACE, RESULTING IN

1 MENTAL, PHYSICAL, AND ECONOMIC HARM;

2 (d) IT IS CRITICAL THAT EMPLOYERS ENGAGE IN PREVENTIVE AND
3 CORRECTIVE ACTIONS TO ELIMINATE WORKPLACE DISCRIMINATION AND
4 HARASSMENT AND ENSURE A SAFE WORKPLACE ENVIRONMENT FOR ALL
5 THEIR EMPLOYEES; AND

6 (e) COURTS SHOULD APPLY THE LAW CONSISTENTLY TO ALL
7 WORKPLACES.

8 (2) ADDITIONALLY, THE GENERAL ASSEMBLY:

9 (a) FINDS THAT THE "SEVERE OR PERVASIVE" STANDARD CREATED
10 BY COURTS TO DETERMINE IF HARASSMENT AT WORK IS A DISCRIMINATORY
11 OR AN UNFAIR EMPLOYMENT PRACTICE DOES NOT TAKE INTO ACCOUNT
12 THE REALITIES OF THE WORKPLACE OR THE HARM THAT WORKPLACE
13 HARASSMENT CAUSES; AND

14 (b) REJECTS THE "SEVERE OR PERVASIVE" STANDARD FOR PROOF
15 OF WORKPLACE HARASSMENT IN FAVOR OF A STANDARD THAT PROHIBITS
16 UNWELCOME HARASSMENT.

17 (3) THE GENERAL ASSEMBLY FURTHER FINDS AND DECLARES THAT:

18 (a) IT IS THE PUBLIC POLICY OF THE STATE TO ENCOURAGE:

19 (I) EMPLOYERS TO ADOPT EQUAL EMPLOYMENT OPPORTUNITY
20 POLICIES TO PREVENT AND DISINCENTIVIZE ILLEGAL HARASSMENT AND
21 DISCRIMINATION; AND

22 (II) THE FREE REPORTING, DISCUSSION, AND EXPOSURE OF
23 DISCRIMINATORY OR UNFAIR EMPLOYMENT PRACTICES IN ORDER TO
24 BETTER PROTECT EMPLOYEES AND DISCOURAGE DISCRIMINATORY OR
25 UNFAIR EMPLOYMENT PRACTICES; AND

26 (b) ATTEMPTS TO INTERFERE WITH EMPLOYEES' ABILITY TO
27 COMMUNICATE ABOUT AND REPORT ALLEGED DISCRIMINATORY OR UNFAIR

1 EMPLOYMENT PRACTICES ARE CONTRARY TO THE PUBLIC POLICY OF THE
2 STATE.

3 **SECTION 4.** In Colorado Revised Statutes, 24-34-401, **add** (4.5)
4 as follows:

5 **24-34-401. Definitions.** As used in this part 4, unless otherwise
6 defined in section 24-34-301 or unless the context otherwise requires:

7 (4.5) (a) "HARASS" OR "HARASSMENT" MEANS TO SUBJECT AN
8 INDIVIDUAL TO UNWELCOME VERBAL, WRITTEN, OR PHYSICAL CONDUCT,
9 WHERE THE FOLLOWING FACTORS ARE MET:

10 (I) THE CONDUCT IS RELATED TO THE INDIVIDUAL'S ACTUAL OR
11 PERCEIVED MEMBERSHIP IN A PROTECTED CLASS BASED ON DISABILITY,
12 RACE, CREED, COLOR, SEX, SEXUAL ORIENTATION, GENDER IDENTITY,
13 GENDER EXPRESSION, MARITAL STATUS, RELIGION, AGE, NATIONAL ORIGIN,
14 OR ANCESTRY; AND

15 (II) (A) SUBMISSION TO THE CONDUCT IS MADE EITHER EXPLICITLY
16 OR IMPLICITLY A TERM OR CONDITION OF THE INDIVIDUAL'S EMPLOYMENT;

17 (B) SUBMISSION TO, OBJECTION TO, OR REJECTION OF THE
18 CONDUCT IS USED AS A BASIS FOR EMPLOYMENT DECISIONS AFFECTING THE
19 INDIVIDUAL; OR

20 (C) WHEN TAKEN AS A WHOLE, THE CONDUCT WOULD BE
21 OFFENSIVE TO A REASONABLE PERSON IN THE SAME ACTUAL OR PERCEIVED
22 PROTECTED CLASS OR WHO SHARES THE SAME OR SIMILAR
23 CHARACTERISTICS AS THE INDIVIDUAL SUBJECTED TO THE CONDUCT, AND
24 THE CONDUCT WAS OFFENSIVE TO THE INDIVIDUAL.

25 (b) WHETHER THE CONDUCT WOULD BE OFFENSIVE TO A
26 REASONABLE PERSON IN THE SAME ACTUAL OR PERCEIVED PROTECTED
27 CLASS OR WHO SHARES THE SAME OR SIMILAR CHARACTERISTICS AS THE

1 INDIVIDUAL SUBJECTED TO THE CONDUCT MUST BE DETERMINED BY A
2 REVIEW OF THE TOTALITY OF THE CIRCUMSTANCES OF THE CONDUCT,
3 INCLUDING:

- 4 (I) THE TYPE OF CONDUCT;
- 5 (II) THE NATURE OF THE CONDUCT; AND
- 6 (III) THE FREQUENCY OF THE CONDUCT, RECOGNIZING THAT A
7 SINGLE ACT OF HARASSMENT MAY BE OFFENSIVE TO A REASONABLE
8 PERSON UNDER THE TOTALITY OF THE CIRCUMSTANCES.

9 (c) WHETHER THE CONDUCT WAS OFFENSIVE TO THE INDIVIDUAL
10 MUST BE DETERMINED BY A REVIEW OF THE TOTALITY OF THE
11 CIRCUMSTANCES OF THE CONDUCT, INCLUDING WHETHER THE INDIVIDUAL
12 WHO WAS SUBJECTED TO THE CONDUCT FELT EXPLICIT OR IMPLICIT
13 PRESSURE TO CONDONE, ENCOURAGE, OR PARTICIPATE IN THE CONDUCT.

14 **SECTION 5.** In Colorado Revised Statutes, 24-34-402, **amend**
15 (1) introductory portion, (1)(a), (1)(b), (1)(c), (1)(d), and (1)(f); and **add**
16 (1)(j) and (1.5) as follows:

17 **24-34-402. Discriminatory or unfair employment practices -**
18 **affirmative defense.** (1) It is a discriminatory or AN unfair employment
19 practice:

20 (a) (I) For an employer to refuse to hire, to discharge, to promote
21 or demote, to harass during the course of employment, or to discriminate
22 in matters of compensation, terms, conditions, or privileges of
23 employment against any individual otherwise qualified because of
24 disability, race, creed, color, sex, sexual orientation, gender identity,
25 gender expression, MARITAL STATUS, religion, age, national origin, or
26 ancestry. ~~but,~~

27 (II) With regard to a disability, it is not a discriminatory or an

1 unfair employment practice for an employer to act as provided in this
2 ~~subsection (1)(a)~~ SUBSECTION (1)(a)(I) OF THIS SECTION if there is no
3 reasonable accommodation that the employer can make with regard to the
4 disability AND the disability actually disqualifies the individual from the
5 job. ~~and the disability has a significant impact on the job. For purposes of~~
6 ~~this subsection (1)(a), "harass" means to create a hostile work~~
7 ~~environment based upon an individual's race, national origin, sex, sexual~~
8 ~~orientation, gender identity, gender expression, disability, age, or religion.~~
9 ~~Notwithstanding the provisions of this subsection (1)(a), harassment is~~
10 ~~not an illegal act unless a complaint is filed with the appropriate authority~~
11 ~~at the complainant's workplace and the authority fails to initiate a~~
12 ~~reasonable investigation of a complaint and take prompt remedial action~~
13 ~~if appropriate.~~

14 (III) FOR A HARASSMENT CLAIM UNDER THIS SUBSECTION (1)(a):

15 (A) THE LEGAL STANDARD FOR HARASSMENT DOES NOT VARY BY
16 TYPE OF WORKPLACE. IT IS IRRELEVANT THAT A PARTICULAR OCCUPATION
17 MAY HAVE BEEN CHARACTERIZED BY A GREATER FREQUENCY OF
18 DISCRIMINATORY COMMENTS OR CONDUCT IN THE PAST.

19 (B) THE CONDUCT DOES NOT NEED TO BE SEVERE OR PERVASIVE TO
20 CONSTITUTE A DISCRIMINATORY OR AN UNFAIR EMPLOYMENT PRACTICE
21 UNDER THIS SUBSECTION (1)(a).

22 (b) (I) For an employment agency to:

23 (A) Refuse to list and properly classify for employment or REFUSE
24 to refer an individual for employment in a known available job for which
25 the individual is otherwise qualified because of disability, race, creed,
26 color, sex, sexual orientation, gender identity, gender expression,
27 MARITAL STATUS, religion, age, national origin, or ancestry; or for an

1 ~~employment agency to~~

2 (B) Comply with a request from an employer for referral of
3 applicants for employment if the request indicates either directly or
4 indirectly that the employer discriminates in employment on account of
5 disability, race, creed, color, sex, sexual orientation, gender identity,
6 gender expression, MARITAL STATUS, religion, age, national origin, or
7 ancestry. ~~but,~~

8 (II) With regard to a disability, it is not a discriminatory or an
9 unfair employment practice for an employment agency to refuse to list
10 and properly classify for employment or to refuse to refer an individual
11 for employment in a known available job for which the individual is
12 otherwise qualified if there is no reasonable accommodation that the
13 employer can make with regard to the disability AND the disability
14 actually disqualifies the applicant from the job. ~~and the disability has a~~
15 ~~significant impact on the job;~~

16 (c) For a labor organization to exclude any individual otherwise
17 qualified from full membership rights in the labor organization, to expel
18 an individual from membership in the labor organization, or to otherwise
19 discriminate against any of its members in the full enjoyment of work
20 opportunity because of disability, race, creed, color, sex, sexual
21 orientation, gender identity, gender expression, MARITAL STATUS,
22 religion, age, national origin, or ancestry;

23 (d) For any employer, employment agency, or labor organization
24 to print or circulate or cause to be printed or circulated any statement,
25 advertisement, or publication, or to use any form of application for
26 employment or membership, or to make any inquiry in connection with
27 prospective employment or membership that expresses, either directly or

1 indirectly, any limitation, specification, or discrimination as to disability,
2 race, creed, color, sex, sexual orientation, gender identity, gender
3 expression, MARITAL STATUS, religion, age, national origin, or ancestry or
4 intent to make any such limitation, specification, or discrimination, unless
5 based ~~upon~~ ON a bona fide occupational qualification or required by and
6 given to an agency of government for security reasons;

7 (f) For any employer, labor organization, joint apprenticeship
8 committee, SPONSOR OF AN APPRENTICESHIP PROGRAM REGISTERED
9 PURSUANT TO ARTICLE 15.7 OF TITLE 8, or vocational school providing,
10 coordinating, or controlling apprenticeship programs or providing,
11 coordinating, or controlling on-the-job training programs or other
12 instruction, training, or retraining programs:

13 (I) (A) To deny to or withhold from any qualified individual
14 because of disability, race, creed, color, sex, sexual orientation, gender
15 identity, gender expression, MARITAL STATUS, religion, age, national
16 origin, or ancestry the right to be admitted to or participate in an
17 apprenticeship training program, an on-the-job training program, or any
18 other occupational instruction, training, or retraining program. ~~but,~~

19 (B) With regard to a disability, it is not a discriminatory or an
20 unfair employment practice to deny or withhold the right to be admitted
21 to or participate in any such program if there is no reasonable
22 accommodation that can be made with regard to the disability AND the
23 disability actually disqualifies the individual from the program. ~~and the~~
24 ~~disability has a significant impact on participation in the program;~~

25 (II) To discriminate against any qualified individual in pursuit of
26 such programs or to discriminate against ~~such an~~ THE individual in the
27 terms, conditions, or privileges of such programs because of disability,

1 race, creed, color, sex, sexual orientation, gender identity, gender
2 expression, MARITAL STATUS, religion, age, national origin, or ancestry;
3 OR

4 (III) To print or circulate or cause to be printed or circulated any
5 statement, advertisement, or publication, or to use any form of application
6 for such programs, or to make any inquiry in connection with such
7 programs that expresses, directly or indirectly, any limitation,
8 specification, or discrimination as to disability, race, creed, color, sex,
9 sexual orientation, gender identity, gender expression, MARITAL STATUS,
10 religion, age, national origin, or ancestry or any intent to make any such
11 limitation, specification, or discrimination, unless based on a bona fide
12 occupational qualification;

13 (j) FOR AN EMPLOYER TO FAIL TO CONDUCT A REASONABLE
14 INVESTIGATION OF, OR FAIL TO TAKE PROMPT, REASONABLE, AND
15 REMEDIAL ACTION IN RESPONSE TO, A COMPLAINT OF HARASSMENT,
16 DISCRIMINATION, RETALIATION, OR ANY COMBINATION OF HARASSMENT,
17 DISCRIMINATION, OR RETALIATION. NOTHING IN THIS SUBSECTION (1)(j)
18 REQUIRES AN INSTITUTION OF HIGHER EDUCATION, AS DEFINED IN SECTION
19 23-5-146 (1)(d), TO VIOLATE FEDERAL LAW OR REGULATION OR TO
20 FOREGO ACCESS TO FEDERAL MONEY AVAILABLE TO THE INSTITUTION OR
21 ITS STUDENTS.

22 (1.5) WHEN AN EMPLOYEE PROVES THAT A SUPERVISOR
23 UNLAWFULLY HARASSED THAT EMPLOYEE, THE EMPLOYER MAY ASSERT AN
24 AFFIRMATIVE DEFENSE TO THE HARASSMENT CLAIM ONLY IF THE
25 EMPLOYER ESTABLISHES THAT:

26 (a) THE EMPLOYER HAS ESTABLISHED A PROGRAM THAT IS
27 REASONABLY DESIGNED TO PREVENT HARASSMENT, DETER FUTURE

1 HARASSERS, AND PROTECT EMPLOYEES FROM HARASSMENT;

2 (b) AS OF THE EFFECTIVE DATE OF THIS SUBSECTION (1.5), THE
3 EMPLOYER:

4 (I) MAINTAINS A DESIGNATED REPOSITORY OF ALL WRITTEN OR
5 ORAL COMPLAINTS OF DISCRIMINATION, HARASSMENT, OR RETALIATION
6 THAT INCLUDES THE DATE OF THE COMPLAINT, THE IDENTITY OF THE
7 COMPLAINING PARTY, THE IDENTITY OF THE ALLEGED PERPETRATOR, AND
8 THE SUBSTANCE OF THE COMPLAINT; AND

9 (II) RETAINS THE RECORDS IN A DESIGNATED REPOSITORY FOR THE
10 DURATION OF THE EMPLOYER'S OPERATIONS AND FOR AT LEAST ONE YEAR
11 AFTER THE EMPLOYER CEASES OPERATIONS;

12 (c) THE EMPLOYER HAS COMMUNICATED THE EXISTENCE AND
13 DETAILS OF THE PROGRAM SPECIFIED IN SUBSECTION (1.5)(a) OF THIS
14 SECTION TO BOTH ITS SUPERVISORY AND NONSUPERVISORY EMPLOYEES;

15 (d) WITHIN THE FIVE YEARS IMMEDIATELY PRECEDING THE
16 EMPLOYER RAISING THE AFFIRMATIVE DEFENSE, NO EMPLOYEE HAS
17 SUBMITTED A CHARGE OR COMPLAINT INTERNALLY OR TO A GOVERNMENT
18 AGENCY THAT ASSERTS DISCRIMINATION, HARASSMENT, OR RETALIATION
19 BY A RELEVANT SUPERVISORY EMPLOYEE; AND

20 (e) THE EMPLOYEE HAS UNREASONABLY FAILED TO TAKE
21 ADVANTAGE OF THE EMPLOYER'S PROGRAM SPECIFIED IN SUBSECTION
22 (1.5)(a) OF THIS SECTION, AS ESTABLISHED BY THE TOTALITY OF THE
23 CIRCUMSTANCES.

24 **SECTION 6.** In Colorado Revised Statutes, **add** 24-34-407 as
25 follows:

26 **24-34-407. Nondisclosure agreements - requirements for**
27 **enforcement - penalties for noncompliance.** (1) A PROVISION IN AN

1 AGREEMENT ENTERED INTO OR RENEWED ON OR AFTER THE EFFECTIVE
2 DATE OF THIS SECTION BETWEEN AN EMPLOYER AND AN EMPLOYEE OR A
3 PROSPECTIVE EMPLOYEE THAT LIMITS THE ABILITY OF THE EMPLOYEE OR
4 PROSPECTIVE EMPLOYEE TO DISCLOSE OR DISCUSS, EITHER ORALLY OR IN
5 WRITING, ANY ALLEGED DISCRIMINATORY OR UNFAIR EMPLOYMENT
6 PRACTICE, WHICH PROVISION IS REFERRED TO IN THIS SECTION AS A
7 "NONDISCLOSURE PROVISION", IS VOID UNLESS:

8 (a) THE NONDISCLOSURE PROVISION APPLIES EQUALLY TO ALL
9 PARTIES TO THE AGREEMENT;

10 (b) THE NONDISCLOSURE PROVISION EXPRESSLY STATES THAT IT
11 DOES NOT RESTRAIN THE EMPLOYEE OR PROSPECTIVE EMPLOYEE FROM
12 DISCLOSING THE UNDERLYING FACTS OF ANY ALLEGED DISCRIMINATORY
13 OR UNFAIR EMPLOYMENT PRACTICE:

14 (I) TO THE EMPLOYEE'S OR PROSPECTIVE EMPLOYEE'S IMMEDIATE
15 FAMILY MEMBERS, RELIGIOUS ADVISOR, MEDICAL OR MENTAL HEALTH
16 PROVIDER, LEGAL COUNSEL, FINANCIAL ADVISOR, OR TAX PREPARER;

17 (II) TO ANY LOCAL, STATE, OR FEDERAL GOVERNMENT AGENCY
18 FOR ANY REASON, INCLUDING DISCLOSING THE EXISTENCE AND TERMS OF
19 A SETTLEMENT AGREEMENT, WITHOUT FIRST NOTIFYING THE EMPLOYER;

20 (III) IN RESPONSE TO LEGAL PROCESS, SUCH AS A SUBPOENA TO
21 TESTIFY AT A DEPOSITION OR IN A COURT, INCLUDING DISCLOSING THE
22 EXISTENCE AND TERMS OF A SETTLEMENT AGREEMENT, WITHOUT FIRST
23 NOTIFYING THE EMPLOYER; AND

24 (IV) FOR ALL OTHER PURPOSES AS REQUIRED BY LAW;

25 (c) THE NONDISCLOSURE PROVISION EXPRESSLY STATES THAT
26 DISCLOSURE OF THE UNDERLYING FACTS OF ANY ALLEGED
27 DISCRIMINATORY OR UNFAIR EMPLOYMENT PRACTICE WITHIN THE

1 PARAMETERS SPECIFIED IN SUBSECTION (1)(b) OF THIS SECTION DOES NOT
2 CONSTITUTE DISPARAGEMENT;

3 (d) THE AGREEMENT INCLUDES A CONDITION THAT IF ANY PARTY
4 TO THE AGREEMENT MAKES A MATERIAL MISREPRESENTATION ABOUT
5 ANOTHER PARTY TO THE AGREEMENT, THE PARTY MAKING THE MATERIAL
6 MISREPRESENTATION MAY NOT ENFORCE ANY NONDISCLOSURE PROVISION
7 OR ASSOCIATED LIQUIDATED DAMAGES PROVISION IN THE AGREEMENT
8 AGAINST ANY OTHER PARTY, BUT ALL REMAINING TERMS OF THE
9 AGREEMENT REMAIN ENFORCEABLE;

10 (e) ANY LIQUIDATED DAMAGES PROVISION IN THE AGREEMENT
11 DOES NOT CONSTITUTE A PENALTY OR PUNISHMENT, AND, TO BE
12 ENFORCED, A LIQUIDATED DAMAGES PROVISION MUST PROVIDE FOR AN
13 AMOUNT OF LIQUIDATED DAMAGES THAT IS:

14 (I) REASONABLE AND PROPORTIONATE IN LIGHT OF THE
15 ANTICIPATED ACTUAL ECONOMIC LOSS THAT A BREACH OF THE
16 AGREEMENT WOULD CAUSE; AND

17 (II) NOT PUNITIVE; AND

18 (f) AN ADDENDUM, SIGNED BY ALL PARTIES TO THE AGREEMENT
19 AND ATTESTING TO COMPLIANCE WITH THIS SUBSECTION (1), IS ATTACHED
20 TO THE AGREEMENT.

21 (2) (a) EACH INSTANCE WHEN AN EMPLOYER INCLUDES IN AN
22 AGREEMENT A NONDISCLOSURE PROVISION THAT VIOLATES SUBSECTION
23 (1) OF THIS SECTION CONSTITUTES A VIOLATION OF THIS SECTION. AN
24 EMPLOYER IS LIABLE FOR ACTUAL DAMAGES AND A PENALTY OF FIVE
25 THOUSAND DOLLARS PER VIOLATION.

26 (b) THE COMMISSION AND ANY EMPLOYEE OR PROSPECTIVE
27 EMPLOYEE WHO IS PRESENTED WITH AN AGREEMENT THAT INCLUDES A

1 NONDISCLOSURE PROVISION THAT VIOLATES SUBSECTION (1) OF THIS
2 SECTION MAY IMMEDIATELY BRING AN ACTION FOR INJUNCTIVE RELIEF
3 AND TO RECOVER PENALTIES. IN ADDITION TO PENALTIES, AN EMPLOYEE
4 OR A PROSPECTIVE EMPLOYEE MAY RECOVER ACTUAL DAMAGES,
5 REASONABLE COSTS, AND ATTORNEY FEES IN ANY PRIVATE ACTION
6 BROUGHT PURSUANT TO THIS SECTION.

7 (3) IN ANY CIVIL ACTION INVOLVING A CLAIM OF A
8 DISCRIMINATORY OR AN UNFAIR EMPLOYMENT PRACTICE, A PLAINTIFF MAY
9 PRESENT EVIDENCE THAT THE EMPLOYER AGAINST WHOM THE ACTION WAS
10 FILED ENTERED INTO ONE OR MORE AGREEMENTS THAT INCLUDED A
11 NONDISCLOSURE PROVISION INVOLVING THE CONDUCT OF THE SAME
12 INDIVIDUAL OR INDIVIDUALS WHO ARE ALLEGED IN THE ACTION TO HAVE
13 ENGAGED IN THE DISCRIMINATORY OR UNFAIR EMPLOYMENT PRACTICE. IF
14 SUCH EVIDENCE IS PRESENTED, THE EVIDENCE SHALL BE CONSIDERED
15 EVIDENCE IN SUPPORT OF AN AWARD OF PUNITIVE DAMAGES.

16 **SECTION 7. Act subject to petition - effective date -**
17 **applicability.** (1) This act takes effect at 12:01 a.m. on the day following
18 the expiration of the ninety-day period after final adjournment of the
19 general assembly; except that, if a referendum petition is filed pursuant
20 to section 1 (3) of article V of the state constitution against this act or an
21 item, section, or part of this act within such period, then the act, item,
22 section, or part will not take effect unless approved by the people at the
23 general election to be held in November 2024 and, in such case, will take
24 effect on the date of the official declaration of the vote thereon by the
25 governor.

26 (2) This act applies to employment practices occurring on or after
27 the applicable effective date of this act.